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No. 92-291

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1992

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

ALEXANDER GRASSI, SR., ET AL.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. A. CANALES
(Counsel of Record)
CANALES & SIMONSON
2601 Morgan Avenue
Corpus Christi, TX 78465
(512) 883-0601

LEO C. SALZMAN
ADAMS & GRAHAM
134 East Van Buren Street
Suite 200
P.O. Drawer 1429
Harlingen, TX 78551
(512) 428-7495

Attorneys for Petitioner

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I. By Holding That the Scope of the Texas Turnover Statute Controls Whether a Proceeding is Removable Under 28 U.S.C. § 1441, the Fifth Circuit Panel's Decision Conflicts With the Established Rule That Removal Statutes Are to be Construed Under Federal Law.

International Paper Company's ("IPC") Petition for a Writ of Certiorari was prompted by the Fifth Circuit panel's instruction to the district court to decide if an action was removable based on:

> " . . . whether, under Texas law, a plaintiff may seek turnover relief from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA [the Uniform Fraudulent Transfer Act] and thus the original defendant (the judgment debtor) retains ownership or control of the property."

(App. 8a)[1] This is the only decision by a United States Court of Appeals in modern times to hold that the scope of a civil action and the remedies allowed under state law control whether a proceeding is an independent and removable "civil action" for § 1441 purposes.

Respondents argue that the holding of the Fifth Circuit panel is "completely consistent" with all relevant prior decisions, but go on to assert that "the scope of relief provided by a state statute is *determinative* of its characterization under established federal standards." (Opp. Br. 6-7 (Respondents' emphasis)) This assertion squarely contradicts the holdings of this Court in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972) and *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941), as well as decisions in the Second, Fourth, Fifth, Eighth and Ninth Circuits, which hold that removal statutes are to be uniformly interpreted under federal law. (Pet. 6-11) As demonstrated below, none of the case law cited by Respondents supports the argument that state law treatment of post-judgment

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[1] The Petition for a Writ of Certiorari is referred to as "Pet." Respondents' Brief in Opposition is referred to as "Opp. Br." All appendix references (App.) are to the appendix contained in Petitioner's Petition for a Writ of Certiorari.

proceedings controls the mandatory application of federal law to the determination of which suits may be removed from state to federal court.

Reduced to its essentials, Respondents' argument is: (1) that the removability of this case is controlled by whether *state* law permits the assertion of a fraudulent conveyance claim as part of the original civil action through the device of a "turnover" application; and (2) that such a result is consistent with cases which have uniformly held that *federal* criteria are determinative of removability. Respondents' position is thus based on a transparent logical contradiction. Under Respondents' analysis, the removability of a fraudulent conveyance action or a garnishment proceeding depends on whether state law permits such an action to be brought as "part" of the underlying action. Any such result would conflict directly with established federal law which requires that the removability of such post-judgment proceedings be uniformly determined under federal law applicable to 28 U.S.C. § 1441, irrespective of the vagaries of state law. To that end, the federal courts have developed federal criteria to determine whether an action is removable. *See infra* pp. 3-4. By making removability in this case turn on " . . . whether, *under Texas law*, a plaintiff may seek turnover relief from a new defendant by alleging the new defendants obtained the property" by means of a fraudulent conveyance, the panel below placed itself squarely in conflict with controlling federal precedent under which removability is determined under federal law, irrespective of the remedies allowed in the underlying action as a matter of state law.

A. The Fifth Circuit Panel's Decision Directly Conflicts With Fifth Circuit Law Holding That Post-Judgment Actions Involving New Claims Against a New Party are Removable as a Matter of Federal Law.

To IPC's knowledge, the exact question of whether a fraudulent conveyance action asserted in the context of a turnover proceeding is a new and separate action for the purpose of removal has never before been determined in the Fifth Circuit.

However, the Fifth Circuit has held that a conceptually identical post-judgment action, a garnishment proceeding, which seeks the enforcement of a debt against a new party, is removable under § 1441(a) and (b) as a separate civil action. *Butler v. Polk*, 592 F.2d 1293, 1295 (1979).[2] In reaching this conclusion in *Butler v. Polk*, the Fifth Circuit reasoned: "garnishment actions against third-parties are generally construed as independent suits, at least in relation to the primary action." *Id.* at 1295. In *Berry v. McLemore*, 795 F.2d 452 (5th Cir. 1982), the Fifth Circuit explained that "[t]he writ of garnishment, under the clear precedent of this Court, is an action separate and independent from the action giving rise to the judgment debt". *Id.* at 455.

In *Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 930 (S.D. Miss. 1975), which the Fifth Circuit cited with approval in *Butler*, 592 F.2d at 1295 n.4, the garnishee removed the action on the basis of diversity jurisdiction, even though the judgment creditor and debtor were residents of the same state. 399 F. Supp. at 930-31. The court permitted removal because the garnishment suit was "one in which an issue of fact might be joined and which is an adversary proceeding calling for judgment independent of the main cause." *Id.* at 931. The court also recognized that "[c]ases following this modern rule [that Federal law is determinative of removal issues] have universally held that garnishment proceedings are 'civil actions' which are removable where diversity and jurisdictional amount are present." *Id.* at 930.

Some of the factors that have influenced the Fifth Circuit's holdings are that such post-judgment actions involve a "new party

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[2] Numerous other courts have also recognized that garnishment actions are removable under § 1441. *See Adriaenssens v. Allstate Ins. Co.*, 258 F.2d 888 (10th Cir. 1958); *London and Lancashire Indem. Co. v. Courtney*, 106 F.2d 277 (10th Cir. 1939); *Bridges v. Bentley*, 716 F. Supp. 1389 (D. Kan. 1989); *Graef v. Graef*, 633 F. Supp. 450 (E.D. Pa. 1986); *see also Pullman Co. v. Jenkins*, 305 U.S. 534, 538 (1939) ("the fact that under the state practice it may be joined in the same suit with another controversy against other defendants, does not preclude removal"); *Swanson v. Liberty Nat'l Ins. Co.*, 353 F.2d 12, 13 (9th Cir. 1965) ("the labels that case had in the state court and the fact that the whole sequence had only one case number there are not determinative of the question of whether the garnishment issue is separable" from the underlying action).

litigating the existence of a new liability", *Butler*, 592 F.2d at 1296; may involve new issues of fact, *Moore*, 399 F. Supp. at 930; and are adversarial, calling for a judgment independent of the main cause. *Id.*; *see also Stewart v. EGNEP (Pty) Ltd.*, 581 F. Supp. 788, 790 (C.D. Ill. 1983).

All of those factors are present in this case and confirm that Respondents' fraudulent conveyance action against IPC is a separate "civil action". First, IPC was not a party to the underlying 1983 personal injury action; it is a new party litigating the existence of an alleged fraudulent transfer. Second, the Turnover Application is couched in terms of liability on IPC's part and, significantly, seeks relief only from IPC. (Pet. 3) While Respondents have contended that they seek no affirmative relief from IPC (Opp. Br. 4, 8-9), that contention is clearly contradicted by their own pleadings and the relief they seek. The purpose of this action is to seize an asset to which IPC has title in order to recover from IPC the judgment which Respondents have been unable to collect from PLC. (Pet. 3) Third, Respondents' action is adversarial and will involve issues of fact and law entirely distinct from the underlying products liability suit. Those issues include questions concerning the sufficiency of the consideration paid by IPC and the circumstances of the sale of Ilford Photo, which have no bearing on the safety of the insulating material which was at issue in the 1983 action. (Pet. 2)

Thus, regardless of whether Texas state law might allow a fraudulent conveyance action to be asserted as a "turnover" application in the underlying litigation, such an action, which is intended to establish an obligation against a new party who is a stranger to the original action, and which will involve an adversarial, evidentiary proceeding, is, but for the conflict created by the Fifth Circuit panel's holding, removable as a matter of federal law.

Respondents attempt to distinguish garnishment proceedings with the argument that a garnishment proceeding imposes a new "liability" whereas a fraudulent conveyance proceeding is said not to do so. As a threshold matter, that is a meaningless distinction since a garnishment proceeding, which seeks only to attach a specific preexisting debt of the garnishee, is more analogous to

a fraudulent conveyance proceeding, which seeks only to attach a specific asset, than to an open-ended "liability" proceeding. More important, for purposes of this petition, that argument is simply irrelevant to the validity of the decision of the panel below, which does not apply federal criteria to determine the removability of garnishment and/or fraudulent conveyance proceedings, but rather makes removability turn on whether the State of Texas allows fraudulent conveyance proceedings to be brought as "part" of the underlying proceeding.

B. The Authority Cited by Respondents Does Not Reconcile the Conflict Created by the Fifth Circuit Panel's Holding.

None of the case law cited in Respondents' Brief in Opposition supports the notion that removal statues can be construed by reference to any thing other-than federal law. Respondents first cite a garnishment case, *Action Auto Stores, Inc. v. United Insurance Company*, No. 5:91-CV-32, available on Westlaw as 1992 WL 21203 (W.D. Mich. 1992). (Opp. Br. 7) Yet, the *Action Auto* court explicitly held:

> "The Supreme Court has determined that a state's procedure cannot control the privilege of removal granted by federal statute. *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). Allowing the state's labeling of its garnishment procedure to control this Court's determination about whether the action is removable might well be inconsistent with the *Chicago R.I. & P.R.* decision. *Drs. Macht, Podore & Associates*, 392 F. Supp. at 67; 1A James Moore, Moore's Federal Practice P 0.167 (2d ed. 1991); *see also Stewart v. EGNEP (Pty), Ltd.*, 581 F. Supp. 788, 789-90 (C.D. Ill. 1983). The Court thus holds that it is not bound by state law but must make its own determination about whether the proceedings are ancillary."

Id. at *2. (App. 4e) The *Action Auto* holding concentrated on the substance of the action to determine whether it was ancillary and disregarded the state law label placed on the action, basing its decision on the fact that the garnishments involved new parties

with different interests than those present in the underlying actions. *Id.*

Similarly, the second garnishment case cited by Respondents, *Butler v. Polk*, 592 F.2d 1293 (5th Cir. 1979), reaffirms that where the parties and liability issues in a post-judgment enforcement action are distinct from those involved in the underlying litigation, the new proceeding should be treated as a separate "civil action" regardless of its characterization under state law. *Id.* at 1296. Respondents cannot assert that the turnover action does not impose any obligation on IPC or place IPC's property at risk (Opp. Br. 8-9), since the only relief sought by Respondents in this litigation is an order directed exclusively at IPC, a new party to the proceeding, to turn over its shares of Ilford Photo or a cash equivalent. (Pet. 3) The fraudulent conveyance action against IPC necessarily challenges the conduct and good faith of IPC in purchasing Ilford Photo, an accusation which requires a judgment in an adversary proceeding independent of the underlying product liability action. Thus, IPC is entitled, purely on the basis of federal law, to remove the action to federal court.

Respondents' Brief in Opposition places a great deal of emphasis on the distinctions Fifth Circuit and Texas state courts have drawn between actions that impose liabilities on new parties and those which are instituted to identify and seize property of a judgment debtor (Opp. Br. 9-11), and attempts to include their fraudulent conveyance action in the latter category. As demonstrated above, Respondents' fraudulent conveyance action does indeed involve the imposition of a new obligation against IPC. *Stewart v. EGNEP*, 581 F. Supp. at 789-90, the only case cited by Respondents in this context that deals with a question of removal, teaches only that a garnishment action may be removed even when state law regards the proceeding as ancillary to the main suit. *Id.* More importantly, none of the other cases cited by Respondents involve the application of federal removal statutes, the interpretation of which, as demonstrated throughout this brief and the original Petition, is controlled by federal law. If anything, these cases illustrate how the application of state law to federal removal statutes can lead to differing results from state to state,

undermining the rule laid down by this Court in *Grubbs v. General Electric Credit Corp.*, 405 U.S. at 705, and *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. at 104, that removal statutes must be construed to have "uniform federal application". *Grubbs*, 405 U.S. at 705. This would be made impossible if courts were forced to adopt disparate characterizations of post-judgment proceedings under varying state laws. (Pet. 10)

The inevitable inconsistency which would result from allowing the Fifth Circuit panel's holding to remain in force is demonstrated by the holding of the Western District of Michigan in *Action Auto*. The *Action Auto* court recognized that under Michigan law, garnishments are ancillary to and part of the underlying civil litigation. *Action Auto*, 1992 WL 21203 at *2. (App. 3-4e) Nevertheless, the Court recognized that "a state's procedure cannot control the privilege of removal granted by federal statute", and found a garnishment action to be a separate and independent action for the purpose of removability. *Id.* Had the *Action Auto* court been bound by the holding of the Fifth Circuit panel, the court would have had no choice but to acknowledge that *under Michigan law*, a garnishment action is an ancillary proceeding and the defendant in question would have been denied his right of removal.

The impossibility of uniformly applying the removal statute under the Fifth Circuit panel's holding is further illustrated by the different categorizations imposed by states on identical proceedings. For example, while the state of Michigan classifies garnishment actions as ancillary, under Mississippi state law, garnishment proceedings are treated as separate causes of action. *See Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 931 (S.D. Miss. 1975). Thus, if courts were bound by the holding of the Fifth Circuit panel, the right of removal in identical proceedings would vary from state to state.

C. Respondents' Attempt to Reconcile the Holding of the Fifth Circuit Panel With Previous Holdings Mischaracterizes the Fifth Circuit Panel's Holding.

Respondents argue against the granting of certiorari by maintaining that the Fifth Circuit panel's holding "did not contravene, but was fully consistent with, all relevant prior decisions." (Opp. Br. 15) The thrust of Respondents' Brief in Opposition (Opp. Br. 11-15) is that the Fifth Circuit Panel only held that a court is not prohibited from "looking" at state statutes before applying federal law to determine whether an action may be removed. Respondents argue that the panel's holding that IPC's right to remove Respondents' fraudulent conveyance action to federal court rested on:

> " . . . whether, *under Texas law*, a plaintiff may seek turnover relief from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA [the Uniform Fraudulent Transfer Act] and thus the original defendant (the judgment debtor) retains ownership or control over the property"

(App. 8a) (emphasis added) only means that:

> " . . . state laws *may* be looked to for the purpose of determining whether the federal characterizations are applicable in each of the disparate circumstances under which their application is sought"

(Opp. Br. 12 (Respondents' emphasis)) and that:

> "[t]he Fifth Circuit in the instant case did not hold that state characterizations may be relied upon to determine whether a proceeding is 'ancillary' or 'independent', but rather that the nature of the state remedies afforded the Respondents must be looked to in determining whether established *federal* criteria have been met."

(Opp. Br. 12 (Respondents' emphasis)) Respondents further distort the panel's holding by arguing that the only question presented is whether courts are to be prohibited from examining state law before applying federal law to removal statutes.

(Opp. Br. 6) Had this been the holding of the Fifth Circuit, IPC would not have filed this Petition for a Writ of Certiorari.

IPC has never construed the holdings of this Court nor of any circuit court to mean that a federal court is forbidden to examine the characteristics of a state remedy in determining whether federal criteria have been met. Federal courts must, of course, examine the nature of the underlying action and the post-judgment remedy in deciding whether the post-judgment proceeding is a removable "civil action" under 28 U.S.C. § 1441. However, this Court, along with the Second, Fourth, Fifth, Eighth and Ninth Circuits, has held that federal law, and federal law alone, governs the determination of whether a proceeding is an independent and removable civil action under 28 U.S.C. § 1441 (Pet. 6-11). In other words, *even if Texas state law explicitly stated that a turnover action could never be treated as a separate proceeding*, a federal court situated in Texas would still be bound to apply federal law, and federal law alone, to determine whether the action in question was an independent and removable "civil action".

Respondents also offer an alternate, and contradictory, interpretation of the Fifth Circuit panel's holding. Although verbally acknowledging that federal standards apply to determinations of whether an action is independent and removable, Respondents contradict themselves by contending that:

> " . . . the Fifth Circuit held that the district court must ascertain the extent of the relief afforded by the Texas Turnover Statute and, if it embraces the determination sought by Respondents, remand the turnover proceeding as one which is ancillary to the underlying (non-removable) claim."

(Opp. Br. 13) This statement can be read only to mean that state and not federal law determines the question of removability, which is precisely the basis for IPC's Petition for a Writ of Certiorari.

Having mischaracterized the holding of the Fifth Circuit panel, Respondents cite several Fifth Circuit cases to support the proposition, never disputed by IPC, that a court may examine

state procedural law before applying federal law to removal questions. (Opp. Br. 13-15) All of these cases affirm that removal statutes are to be interpreted under federal, not state, law and in doing so conflict with the holding of the Fifth Circuit panel.

Finally, when confronted with the contradictions between the Fifth Circuit panel's holding and the rulings of this Court and the Second, Fourth, Eighth and Ninth Circuits, Respondents respond by reciting the case law presented by Petitioner and repeatedly asserting that their interpretation of the Fifth Circuit panel's holding does not conflict with the principle that removal statutes are to be uniformly interpreted under federal law. (Opp. Br. 12-13) Not surprisingly, Respondents make no attempt to reconcile the actual language of the panel's holding with their characterizations of that holding. Indeed, as shown above, they are forced to admit that the panel's decision makes state law determinative of removability. Respondents' disingenuous and conflicting interpretations of the Fifth Circuit panel's clear and straightforward holding must not be allowed to distract attention from the serious conflict between the Fifth Circuit panel's holding and previous rulings of this Court and the Second, Fourth, Fifth, Eighth and Ninth Circuits.

CONCLUSION

For the foregoing reasons and the reasons given in Petitioner's opening brief, this Court should issue a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LEO C. SALZMAN
ADAMS & GRAHAM
134 East Van Buren Street
Suite 200
P.O. Drawer 1429
Harlingen, TX 78551
(512) 428-7495

J. A. CANALES
(Counsel of Record)
CANALES & SIMONSON
2601 Morgan Avenue
Corpus Christi, TX 78465
(512) 883-0601

Attorneys for Petitioner

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